DEC 4 2000

(8)

No. 99-2035

Supreme Court, U.S.
FILED
DEC 4 - 2000

IN THE

Supreme Court of the United States

COOPER INDUSTRIES, INC.,
Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONER

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December 4, 2000

AMERICAN FINANCIAL PRINTERS • WASHINGTON, DC • (202) 457-0030

29 pp

QUESTION PRESENTED

Amici will address the following question: Should an appellate court apply a *de novo* review standard when ruling on a challenge to the constitutionality of a punitive damages award?

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INTEREST OF THE AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF's Legal Studies Division also publishes monographs and other publications on these topics.[1]

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including opposing excessive punitive damages awards. WLF appeared as amicus curiae in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and WLF has published numerous articles regarding punitive damages. *See, e.g.*, Arvin Maskin, et al., *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Foundation 1994); Victor E. Schwartz, et al., *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Foundation Working Paper No. 50, 1992); Stephen M. Turner, et al., *Punitive Damages Explosion: Fact or Fiction?* (Washington Legal Foundation Working Paper No. 50, 1992); Victor E.

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[1] Pursuant to this Court's Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person or entity, other than amici and their counsel, made a monetary contribution to the preparation and submission of this brief. Counsel of record for both parties have consented to the filing of this brief in letters that have been lodged with the Clerk.

Schwartz, *Punitive Damages: Should the Constitution of the United States Provide Boundaries* (Washington Legal Foundation Legal Backgrounder, 1989); Theodore B. Olson and Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Foundation Legal Backgrounder 1989). Excessive and unpredictable punitive damages are ultimately harmful to the economy, workers and consumers.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF, including *BMW of N. Am. Inc. v. Gore* and *Pacific Mut. Life Ins. Co. v. Haslip.*

Amici believe that they can bring a broader perspective on the issues presented in this case which will assist the Court in deciding this case in such a way as to give clearer guidance to courts on the imposition and judicial review of punitive damages awards.

STATEMENT OF THE CASE

Amici curiae are, in the interest of brevity, omitting any detailed statements of the facts of this case. Amici adopt by reference the statement of facts set forth in Petitioner's Brief.

In short, both Petitioner, Cooper Industries, Inc. ("Cooper") and Respondent Leatherman Tool Group, Inc. ("Leatherman") manufacture hand tools. Cooper sought to expand its product line, and develop a multi-function hand

tool, similar to the Pocket Survival Tool (PST) marketed by Leatherman. As it was legally entitled to do, Cooper incorporated many of the unprotectible, functional elements of the PST into its product (ultimately marketed under the name "ToolZall"), to which it added several important modifications.

When the time came for preparing advertisements for the ToolZall, the new product had not yet been physically produced. Thus, a Cooper employee made the decision to use a slightly-modified PST in the advertising photographs, from which uniquely PST features were removed and uniquely ToolZall features added, rendering it visually indistinguishable from the Cooper tool as ultimately produced. Upon seeing the ToolZall advertisements, in which it recognized its own modified product, Respondent brought suit, claiming trade dress infringement under the Lanham Act, unfair competition, false advertising and "passing off." Shortly thereafter, Cooper retracted the advertisements containing the modified PST and voluntarily withdrew its ToolZall from the domestic market.

At trial, the jury found for Respondent on the trade dress claim, although awarded no damages. On the common law unfair competition, "passing off" and false advertising claims, the jury also found for the Respondents and awarded $50,000 in compensatory damages. In addition, the jury assessed $4.5 million in punitive damages against Cooper.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the trade dress infringement verdict, holding that the PST was wholly functional, and therefore did not constitute a protectible trade dress. Although reversing part of the judgment, indicating juror confusion or

misapplication of the law, the Court, under a highly deferential abuse of discretion standard of review, made no adjustment to the punitive damages award.

SUMMARY OF ARGUMENT

Recognizing the extraordinary importance of rights protected by the Federal Constitution, this Court, and appellate courts throughout the Nation, have consistently reviewed allegations of constitutional violations under a *de novo* standard. This heightened standard of review has been deemed essential to provide consistency and predictability, and to ensure that issues of constitutional dimension are analyzed by appellate courts, the expositors of the law, without undue deference to the trier of fact.

On numerous occasions this Court has acknowledged that excessive punitive damages awards violate the Due Process Clause of the Constitution, and has held that meaningful appellate review of punitive damages awards is necessary to comport with Due Process. Accordingly, this Court should find that appellate courts must utilize the same *de novo* standard in reviewing punitive damages awards that may exceed the limits imposed by the Due Process Clause as they use to review other alleged constitutional violations. The sacred rights provided for in the Constitution for all individuals demand no less.

Indeed, only *de novo* review ensures that punitive damages awards will be predictable, fair and consistent, and that the legal issues of constitutional magnitude which they raise are shaped by the court and not the whim of individual juries. Juries are afforded enormous discretion in determining the amount of punitive damages to be awarded and often are given little guidance as to how to

calculate an appropriate punitive damages award. Moreover, they are often not even required to justify their ultimate decision. And, individual jurors often arrive in the courtroom with a personal agenda against wealthy or foreign defendants, or are persuaded to adopt such an agenda by a sympathetic plaintiff. Furthermore, a jury's complete lack of expertise in the structure of corporations, the appropriate amount necessary to punish and deter, and the impact their award may have on the financial viability of a corporation compels the conclusion that their findings not be immune to the careful, principled, independent review of an appellate court, offering predictability, consistency and even-handedness.

ARGUMENT

I. POTENTIAL CONSTITUTIONAL VIOLATIONS HAVE ALWAYS BEEN REVIEWED *DE NOVO*

"The Bill of Rights, contained in the first ten amendments to the Constitution, is every American's guarantee of freedom," Hon. Arthur J. Goldberg, *Can We Afford the Bill of Rights*, 129 MIL. L. REV. 1 (1990) (quoting President H. Truman, *Memoirs* 269 (1956)), a freedom which cannot be diluted by legislatures, courts or the caprice of a jury. Indeed,

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and

> assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

Recognizing and safeguarding the fundamental importance of rights enshrined in the Federal Constitution, this Court, and appellate courts throughout the Nation, have consistently reviewed alleged constitutional violations *de novo*. Indeed,

> [t]he requirement of independent appellate review . . . is a rule of federal constitutional law. . . . It reflects a deeply held conviction that judges – and particularly Members of this Court – must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. . . . Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold . . . .

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984).

Thus, in *Bose*, this Court held that *de novo* review of whether speech claimed to be protected by the First Amendment was motivated by actual malice was essential to protect the "precious liberties established and ordained by the Constitution." *Bose*, 466 U.S. at 511. In *Bose*, petitioner alleged that statements published in respondent's magazine review concerning the quality of sound produced by petitioner's loudspeaker system were false and disparaging. The district court found that petitioner was a public figure, precluding recovery for product

disparagement unless petitioner proved by clear and convincing evidence that respondent's speech was motivated by actual malice. *Id.* at 489-90. The district court found that petitioner had indeed met this burden, and entered judgment in petitioner's favor. *Id.* at 491. On appeal, the United States Court of Appeals for the First Circuit reversed, accepting that the comment about which petitioner complained was false, assuming without deciding that it was a statement of fact rather than unprotectible opinion, but finding, upon *de novo* review, insufficient evidence of actual malice. *Id.* at 491-92. Petitioner objected to the standard of review employed by the Court of Appeals, arguing that an actual malice determination was more akin to a question of fact, meriting review under a clearly erroneous standard. *Id.* at 498-99.

Rejecting Petitioner's objections, this Court painstakingly explained that largely factual issues may cross over into the legal realm, warranting careful, independent appellate review, especially where "the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact." *Id.* at 501. The Court concluded that whether or not actual malice had been established, and thus whether the speech fell within the "majestic protection of the First Amendment," *id.* at 504, was an issue of such import. *See id.* at 508 n.27 ("This Court has an obligation to test challenged judgments against the guarantees of the First and Fourteenth Amendments, and in doing so this Court cannot avoid making an independent constitutional judgment on the facts of the case. The simple fact is that First Amendment questions of 'constitutional fact' compel this Court's *de novo* review.") (citations and quotation marks omitted). As a matter of federal constitutional law, minimal restrictions on jury discretion and cursory appellate review are

insufficient to safeguard constitutional rights. *See id.* at 506-07 ("We have therefore rejected the contention that a jury finding. . . is insulated from review so long as the jury was properly instructed and there is some evidence to support its findings, holding that substantive constitutional limitations govern."). *See also Peel v. Attorney Registration & Discipline Comm'n*, 496 U.S. 91, 108 (1990) (whether a statement merits First Amendment protection is reviewed *de novo*); *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946) ("[We] are compelled to examine for ourselves the statements in issue . . . to see whether or not they do carry a threat of clear and present danger . . . or whether they are of a character which the principles of the First Amendment . . . protect."); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 493 (1991) (constitutional violations are reviewed *de novo*).

Similarly, in *Ornelas v. United States*, 517 U.S. 690 (1996), this Court found that a *de novo* standard of review must be applied in reviewing a probable cause or reasonable suspicion determination in the case of a warrantless search in violation of the Fourth Amendment. In *Ornelas*, petitioners moved to suppress cocaine which police officers found in the car in which petitioners were travelling, on the grounds that the warrantless search of their car was undertaken without probable cause, thus violating their Fourth Amendment rights. Petitioners were initially stopped because their car, an older model two-door General Motors car, was recognized to be a favorite among drug couriers, *id.* at 692, and its license plates were issued in California, a source state for drugs. *Id.* Petitioners consented to a search of the vehicle, during which the police found a loose panel, under which two kilograms of cocaine were found. *Id.* at 693. The district court found that the age and model of the car, with license plates from

a source-state, combined with the fact that petitioners were checking into a motel, in the middle of the night, without reservations, and were both listed in the Narcotics and Dangerous Drugs Information System (NADDIS), provided reasonable suspicion. *Id.* at 694. This suspicion became probable cause when the searching officer discovered a loose panel in the car. *Id.* On appeal, the United States Court of Appeals for the Seventh Circuit affirmed, although reviewing the existence of probable cause under an abuse of discretion standard, rather than the *de novo* standard urged by the government. *Id.* at 694-95.

This Court granted *certiorari* to resolve the appropriate standard of review under which the existence of reasonable suspicion and probable cause should be analyzed, *id.*, concluding that *de novo* review was necessary to determine whether a constitutional violation had occurred. This conclusion was compelled by three rationales.[2] First, the Court noted that *de novo* review provides consistency, whereby similar situations are treated similarly. "A policy of sweeping deference would permit, in the absence of any significant difference in the facts, the Fourth Amendment's incidence to turn on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." *Id.* at 697 (citations and internal quotations omitted). Secondly, the Court observed that "the legal rules for probable cause and reasonable suspicion acquire content only through application." *Id.* Permitting too much deference to a factfinder's judgment would, in effect, allow the factfinder

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[2] As discussed in Point II, *infra*, each of these rationales is equally applicable to the determination of whether a punitive damages award is constitutionally excessive.

to mould the law, and "strip a federal appellate court of its primary function as an expositor of law." *Id.* (citing *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Finally, the Court noted that *de novo* review serves to "unify precedent," thus providing predictability in the law. *Id.*

And, this Court's examination of the standard of review applicable to challenges under the Eight Amendment's Excessive Fines Clause in *United States v. Bajakajian*, 524 U.S. 321 (1998), demonstrates why potentially unconstitutional excessive takings, whether in the form of fines or punitive damages, merit heightened scrutiny. In *Bajakajian*, respondent attempted to leave the United States without reporting that he was bringing with him over $350,000 in currency. This reporting violation carried a penalty of forfeiture of the entire amount involved in the offense, in this case, $350,000. After finding that the forfeiture was a fine, within the scope of the Excessive Fines Clause, the Court turned to the question of whether the fine was excessive.

As a threshold matter, the Court emphasized that the amount of the punishment must be "proportional," that is, bear some reasonable relationship to the gravity of the offense that it is designed to punish. *See id.* at 334. The *Bajakajian* Court held that this inquiry must be conducted *de novo*, explicitly rejecting an abuse of discretion standard, because, "the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case." *Id.* at 337. Only a *de novo* standard can assure that the remedy imposed is tailored to the gravity of the offense, avoiding unconstitutionally excessive punishment.

Accordingly, given this Court's teachings and the sacrosanct nature of rights protected by our Constitution, appellate courts throughout the nation have consistently applied a *de novo* standard to review claims of constitutional violations. *See, e.g., Morales v. Immigration & Naturalization Serv.*, 208 F.3d 323, 327 (1st Cir. 2000) (appellate court reviews *de novo* whether an administrative law judge violated party's Due Process rights, denying him a full and fair hearing); *United States v. Jackson*, 181 F.3d 740, 743 (6th Cir. 1999) (constitutional challenges to criminal sentences are questions of law, to be reviewed *de novo*); *Andriasian v. Immigration & Naturalization Serv.*, 180 F.3d 1033, 1040 (9th Cir. 1999) (claims of due process violations in immigration proceedings are reviewed *de novo*); *Tapia v. Roe*, 189 F.3d 1052, 1056 (9th Cir. 1999) (reviewing *de novo* whether a jury instruction violates due process by creating an unconstitutional presumption or inference); *Horstkoetter v. Dep't of Public Safety*, 159 F.3d 1265, 1270 (10th Cir. 1998) (appellate court has an obligation to make an independent examination of entire record in First Amendment cases, to ensure that there has been no unconstitutional intrusion into the constitutionally protected realm of free speech); *United States v. Vahovick*, 160 F.3d 395, 398 (7th Cir. 1998) (reviewing constitutionality of application of sentencing guidelines *de novo*); *United States v. Hamilton*, 128 F.3d 996, 999 (6th Cir. 1997) (reviewing *de novo* whether evidentiary ruling violated defendant's Sixth Amendment right to cross-examine adverse witnesses); *United States v. Osborne*, 68 F.3d 94, 98 (5th Cir. 1995) (reviewing *de novo* claims that Sixth Amendment right to public trial was violated); *United States v. Hardy*, 37 F.3d 753, 756 (1st Cir. 1994) (using *de novo* standard of review to determine whether prosecutor's veiled reference to defendant's failure to testify violated defendant's Fifth Amendment rights).

II. PUNITIVE DAMAGE AWARDS THAT MAY EXCEED THE LIMITS IMPOSED BY THE DUE PROCESS CLAUSE IMPLICATE FUNDAMENTAL CONSTITUTIONAL RIGHTS AND SHOULD BE SUBJECT TO *DE NOVO* REVIEW

A. This Court Has Already Found That An Excessive Punitive Damage Award Will Violate The Limits Imposed By The Due Process Clause

In the recent decisions of this Court regarding punitive damages, "a majority of the Justices agreed that the Due Process Clause imposes a limit on punitive damages awards." *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994). *See also TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 ("[T]he Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'") (citations omitted); *Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966) ("Both liberty and property are specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process . . . .").

Thus, because excessive punitive damages awards may run afoul of the limits imposed by the Due Process Clause, review of the propriety of such awards deserves no less conscientious, principled a review as is routinely afforded to other alleged constitutional violations. *See supra,* Point I. Therefore, allegations of unconstitutionally excessive punitive damages awards should be reviewed under a *de novo* standard of review. Were this Court to hold

otherwise, it would cast Due Process challenges to excessive punitive damages awards adrift, leaving them an inexplicable anomaly in constitutional law.

B. *De Novo* Appellate Review Is Necessary Given The Wide Latitude Afforded Juries In Assessing Punitive Damages

The rationales favoring *de novo* review, namely consistency, unification of precedent and vesting in the court the primary responsibility for shaping the law, apply with equal force to review of punitive damage awards. A less exacting standard of review permits the size of a punitive damages award to turn on the whim of an individual jury, especially troublesome in light of the vast discretion juries are afforded in assessing punitive damages awards. Requiring *de novo* review allows an appellate court to conduct a meaningful review of an award, strive to ascertain whether the award is reasonable and consistent with penalties imposed for similar conduct by other defendants and in other jurisdictions, and modify anomalous awards. Over time, a standard of reasonable punitive damages, and a set of factors appropriate and inappropriate to consider in determining the amount of the award, will emerge. These controls will further the important goal of unifying the law of punitive damages, providing defendants fair notice of the potential consequences of their action, and juries and lower courts with guidance on this important issue. Finally, only a *de novo* standard of review will ensure that it is the courts which are ultimately charting the contours of Due Process.

1. A *De Novo* Review Of A Potentially Excessive Punitive Damages Award Will Provide The Meaningful Review Required By The Due Process Clause

Judicial review under any standard other than *de novo* simply fails to provide the conscientious, meaningful review that this Court has found, and should reaffirm, to be necessary to comport with Due Process.[3] In the first instance, the factfinder assessing a punitive damages award is afforded such vast, unbridled discretion, that an abuse of that discretion is almost impossible. *See Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) ("Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left to themselves in making this important, and potentially devastating, decision."); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) ("In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused."). Often, jurors are not instructed in detail as to the factors to

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[3] *See Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (holding that prohibition of judicial review of punitive damages awards violated Due Process); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (cautioning that "unlimited jury discretion – or unlimited judicial discretion for that matter – in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities," *Haslip*, 419 U.S. at 18, but finding that Due Process was not offended where petitioner had been afforded a "full panoply" of procedural protections, *id.* at 23, such that a "sufficiently definite and meaningful constraint," *id.* at 22, had been imposed on the factfinder's judgment).

consider in punitive damages analysis, or how those factors should be weighed. *See* Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 285 (1983). Nor is the typical juror reminded that compensatory damages also provide a means of deterrence and retribution. *See id.* Rather, as Justice O'Connor noted in *Haslip*, a fairly standard jury instruction "suggests that the jury may do whatever it 'feels' like" with respect to punitive damages awards. *Haslip*, 499 U.S. at 44. Moreover, jurors are not required to explain how they arrived at the amount of the penalty they have chosen to impose upon a defendant. Thus, with the exception of the most egregious verdicts, there will be no concrete proof that discretion was abused and due process compromised. Only the gnawing suspicion of the reviewing court may suggest that an injustice has been perpetrated, an injustice which may never be rectified if the appellate court is limited by a deferential standard of review.

These fears become more acute in cases such as the instant case, where the verdict on one of multiple claims supporting an undifferentiated punitive damages was reversed on appeal. Because the jury is not required to explain what factors or claims motivated their punitive damages award, the reviewing court is unable to ascertain whether or to what degree the erroneously decided claim impacted the punitive damages amount. Allowing such a punitive damages claim to stand where the verdict which may have supported it falls sends a message to reviewing courts that, when confronted with a legal wrong, their power to correct it may be limited.

2. Because Jurors May Be Motivated By Improper Factors In Assessing Punitive Damages Awards, *De Novo* Review Is Merited

The very nature of punitive damages awards suggests that their award may be fraught with prejudice and unsavory motives, necessitating stringent, meaningful, appellate review to ensure that such improper factors do not infect the final verdict. As one commentator has cogently explained, conflicting tensions are inherent in the punitive damages process:

> Another inconsistency arises when the court first instructs that punitive damages cannot be awarded unless the jury finds the defendant's conduct outrageous, but then instructs that the size of the punitive damages award cannot reflect the jury's passion or prejudice. This pairing of instructions assumes that the same jurors can be outraged when awarding punitive damages, but dispassionate when setting the amount. . . . [T]he assumption that jurors can dispassionately find conduct to be outrageous seems rather unrealistic.

Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 287 (1983).

Furthermore, the emotional arguments exhorting the jury to award punitive damages awards more often than not play upon such juror passion and prejudice, frequently focusing on defendant's foreign status and wealth. In *Oberg*, for example, jurors were reminded that the defendant manufacturer, against whom punitive damages were sought, was a Japanese corporation, while plaintiff was

"a red-blooded 20 year-old American boy." *See* Brief of Amici Curiae of Product Liability Advisory Council, *et al.*, No. 93-644, 1993 U.S. Briefs 644 at 9-10. The nationalities of parties would seem to be entirely irrelevant to the decision at hand, their mention by plaintiff's counsel surely serving only to illicitly encourage the jury to redistribute wealth which was not theirs to redistribute, to "one of their own." Similarly, in *TXO*, Justice O'Connor expressed concern over the "near certainty" of prejudice resulting from closing arguments dwelling on defendant's out-of-state status and wealth. 509 U.S. at 493 (quoting plaintiff's counsel's depiction of the defendant as "Texas high rollers, wildcatters" and a "greedy bunch from down in Texas").

Like out-of-state status, the wealth of a corporate defendant can also inflame the passions of a jury, and breathe life into their Robin Hood longings. *See id.* at 492 (citing Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1191 (1931) ("It is a good guess that rich men do not fare well before juries, and the more emphasis placed on their riches, the less well they fare.")). Indeed, the enormous bias jurors may harbor towards corporate defendants was vividly portrayed in a recent poll of potential jurors nationwide conducted by the National Law Journal. Van Voris, *Poll: Jurors Give Business Little Respect*, NEW YORK L.J. (Nov. 20, 2000). Of 1000 people polled, 76% agreed (43% strongly and 33% somewhat) with the statement that "Executives of big companies often try to cover up the harm they do." *Id.* Many respondents stated that they could not be impartial in cases involving particular classes of defendants. The percentage of potential jurors biased against defendants ranged from 24% against tire manufacturers, 26% against hospitals, 29% against breast implant manufacturers, 31% against gun manufacturers, 32% against asbestos manufacturers, and 34% against

tobacco companies. *Id.* The fact that such a large percentage of the jury pool is biased, even before hearing a case, against big business counsels against heightened deference to awards they impose. More alarmingly, 30% of respondents believed that to send "an effective message" to a company the damages award must be in the *billions*. *Id.* Such mammoth figures, incomprehensible to most people, highlight the urgency of a meaningful, fair procedure to ensure that corporations are not driven out of business, and prices of products are not driven out of reach of the average consumer, because of the costs of astronomical punitive damages awards.

3. Assessment Of The Amount Of The Punitive Damages Award Is Not Within The Specialized Province Of The Jury, Thus Deference To A Jury's Award Is Not Merited

In all likelihood, a lay jury has little or no experience in corporate structure, no knowledge of the effects that their decision may have on the financial viability of a corporation or the availability of worthwhile products in the marketplace, and no training in the amorphous field of appropriate punishment and deterrence. The assessment of corporate wealth, even apart from an inquiry as to what percentage of that wealth represents an appropriate punishment, is complex. As one commentator has explained:

> Because the defendant's wealth is a relevant factor in determining the amount of punitive damages, one must inquire what "wealth" really means in the case of a manufacturing entity. Basic financial sheet data

> such as sales, profits, and net worth most often have been regarded as the relevant indicators of a corporation's "wealth." Yet figures on a company's sales are often largely unrelated to a company's true financial prosperity, for very little of the gross earnings remains – even when times are good – after deducting the costs of materials, labor, sales administration, taxes, and increasingly, the cost of capital. Even profits after taxes are plainly not idle wealth, because the enterprise will fail if the owners do not receive a fair return on their investment. And even after the payment of dividends, although such retained "profits" may travel to the balance sheet adding to net worth, the remaining dollars hardly represent a pot of idle gold, ripe for plucking by the plaintiff and his lawyer, for usually they will be reinvested in plant, equipment, salaries and other future cost of operation – "the costs of staying in business."

David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 19-20 (1982) (footnotes omitted).

Thus, while great deference is rightly paid to jury's credibility determinations and findings of fact, in recognition of the truth that the jury observed the witnesses and pieced together real-life events, gaining knowledge of the case inaccessible to an appellate court faced with merely a paper record, jurors do not possess any special skill in assessing damages worthy of the deference some courts accord their findings. Rather, upon finding that punitive damages are warranted, the amount awarded seems likely to be influenced largely by the percentage of profits or number of days of sales that plaintiff counsel arbitrarily exhorts the jury to redistribute from defendant to plaintiff. Thus, the

rationale for hesitancy in displacing a jury's judgment with that of a reviewing court is simply inapplicable in the punitive damages context.

4. A *De Novo* Review Will Ensure Consistency, Predictability And Even-Handedness In The Award Of Punitive Damages

In rendering its decisions on punitive damages awards, this Court has declined to draw a "mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable." *Haslip*, 499 U.S. at 18. Such rejection of a mechanical formula is justified, as no abstraction can take into account the many intricacies shaping a punitive damages award, such as reprehensibility of defendant's conduct, likelihood that conduct will be repeated, and punishment already incurred and likely to be incurred. Nevertheless, this Court has recognized that ensuring that the amount of the punitive damages award is reasonable and rational is a worthy goal. *See, e.g.*, *Oberg*, 512 U.S. at 429. Thus, in *Oberg*, this Court rejected Oregon's argument that the state's power to overturn an award in cases with insufficient evidence to support an award of punitive damages was sufficient to allay Due Process concerns. *Id.* ("This argument is unconvincing, because the review provided by Oregon courts ensures only that there is evidence to support some punitive damages, not that there is evidence to support the amount actually awarded. While Oregon's judicial review ensures that punitive damages are not awarded against defendants entirely innocent of conduct warranting exemplary damages, Oregon, unlike the common law, provides no assurance that those whose conduct is sanctionable by punitive damages

are not subjected to arbitrary amounts."). *See also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The sanction in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question of whether a lesser deterrent would have adequately protected the interests of . . . consumers.").

Although no jury or court will consistently arrive at the one magic number which reflects an ideal punishment for a particular defendant in a particular situation, the difficulty of determining an appropriate punishment with precision should not lead courts to abandon that quest. Under an abuse of discretion standard, widely varying punitive damages awards for similar conduct may be imposed, and allowed to let stand, where the only rationale for the different amounts awarded is that different juries determined the punishment. Freeing the reviewing court from the strictures of overly deferential review allows the court to view an award in light of awards that have been ordered against similarly situated defendants for similar conduct and ensures that it is the court, and not the jury, which provides the ultimate interpretation of the Due Process Clause. This provides the essential elements of predictability and consistency among punitive damages awards, and in the process, instills a greater sense of respect for the method by which those penalties are imposed. *See Ornelas*, 517 U.S. at 697.

Indeed, this Court has recognized that only *de novo* review can provide the required consistency and proportionality of whether a monetary fine is excessive. In *Bajakajian*, the Court held that, to avoid constitutional

infirmity, a fine must bear a reasonable relationship to the severity of the underlying criminal offense. Whether the penalty is proportional to the offense is to be reviewed *de novo*. *Bajakajian*, 524 U.S. at 338. This reasonable relationship standard which guided the Court in *Bajakajian* has likewise been applied in the context of assessing whether a punitive damages award is excessive. *See Haslip*, 499 U.S. at 18, *TXO*, 509 U.S. at 459. Under an abuse of discretion standard, a court must give its blessing to widely varying punitive damages amounts, imposed for similar conduct, violating the spirit of proportionality so important to the *Bajakajian* Court. Such a superficial review of the figure selected by a jury, with little knowledge of economic realities, the amounts imposed on the defendant in the past or likely to be imposed in the future, and the amounts imposed in other jurisdictions for similar conduct, simply announces that we have abdicated efforts to ensure that a fair, proportional punishment, no more than is reasonable, be imposed upon a defendant.

CONCLUSION

This Court has acknowledged a deeply held conviction that "judges–and particularly Members of this Court – must exercise. . . [independent] review in order to preserve the precious liberties established and ordained by the Constitution." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510-11 (1984). This Court should similarly hold that Due Process concerns raised by excessive punitive damages awards are no less weighty than other alleged constitutional violations, and empower and require appellate courts to review punitive damages awards *de novo*.

Respectfully submitted.

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Dated: December 4, 2000